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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 68

F. S. WHELAN & SONS, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

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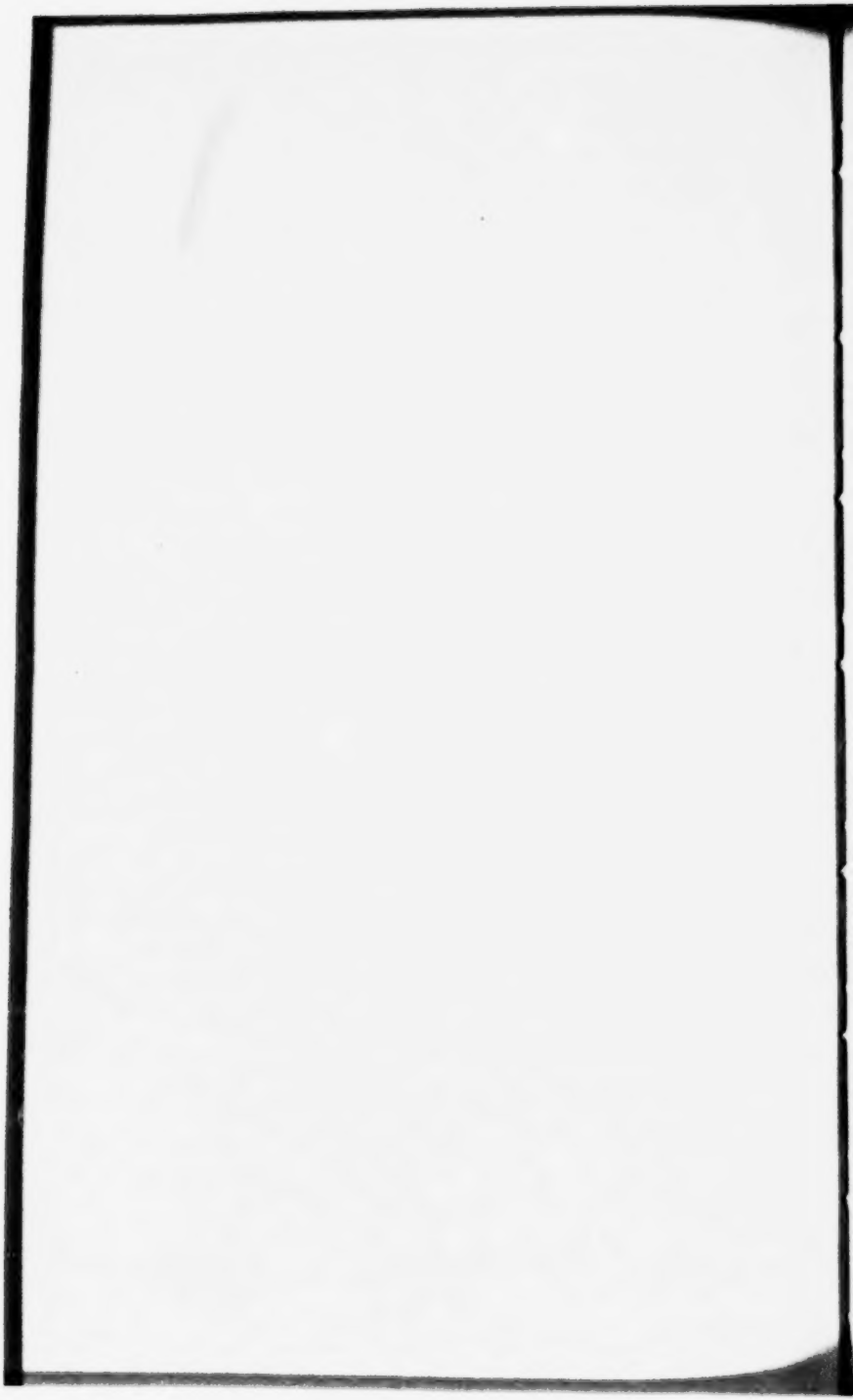

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F. S. WHELAN & SONS, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

F. S. Whelan & Sons, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in the above entitled cause on February 18, 1952.

OPINIONS BELOW.

The opinion of the trial judge in the Customs Court (R. 63) is reported in 25 Customs 384, Reap. Decision #7864; the Opinion of the U. S. Customs Court, 2nd Division (R. 83), Reap. Decision #7995, is reported in Treasury Decisions, Vol. 86, No. 21, page 40 (May 24, 1951); and the opinion of the U. S. Court of Customs and Patent

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Appeals (R. 97), C. A. D. 482, is reported in Treasury Decisions, Vol. 87, No. 14, page 54 (April 3, 1952).

JURISDICTION.

The judgment of the United States Court of Customs and Patent Appeals was entered on February 18, 1952 (R. 104). The jurisdiction of this Court is invoked under 28 U. S. C. § 1256 (1946 ed.).

QUESTION PRESENTED.

Where 90% of a lumber product sold by the producing mill is sold in carload quantities, are not carload quantities the "usual wholesale quantities" for valuation purposes under Section 402 of the Tariff Act of 1930, even though the 5% of sales in quantities of less than 5M square feet may have involved a larger number of individual transactions?

STATUTE INVOLVED.

Section 402(c) of the Tariff Act of 1930 (Title 19 USC, Section 1402) is as follows:

> "The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."

STATEMENT.

This case involves solely the proper interpretation of the word "usual" in the phrase "usual wholesale quantities" as used in Section 402 of the Tariff Act of 1930. The facts are simple and not in dispute.

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The case concerns the determination of the "foreign value" for duty purposes, of a shipment of birch plywood imported from Canada into the United States. The foreign value of imported merchandise is the price at which the merchandise is sold in the foreign market of origin "in the usual wholesale quantities in the ordinary course of trade."

The following is an analysis of sales of the product in question in Canada, as developed for a test period in an investigation by the Treasury Department (R. 65):

Quantity	No. of Sales	% of Total Vol. of Sales in Square Feet	% of Total Invoice Value
Carload	59	90.59	89.15
Less than carload but over 5M sq. ft.	39	4.57	5.00
Less than carload and less than 5M sq. ft.	170	4.84	5.85
TOTAL	268	100.00	100.00

Thus, approximately 90% of all of the products sold during the test period, both in volume and invoice value, was sold in carload quantities. However, the Treasury Department refused to look beyond the *number* of sales. Because there were 170 sales in the smaller lots of less than carload, less than 5M square feet, compared with 59 carload sales, the former were held to constitute the "usual wholesale quantities," regardless of all other factors. We thus have the seemingly absurd result under the Treasury Department ruling that the usual wholesale quantities constituted only 5% of the product sold.

Because an additional charge of 20% was made to the customer who purchased in the small quantities, the effect of the Treasury Department ruling was to increase the amount of the duty by 20%.

Petitioner has contended that the word "usual" cannot be arbitrarily limited solely to the number of transactions, but is a word of general significance requiring that all rele-

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vant facts and circumstances be taken into account. We have not denied that the number of transactions is an important factor. We recognize that it may be determinative in the absence of other considerations. But where a lumber product is involved, which characteristically is sold in carload lots, and where 90% of the product is in fact sold by the carload, it seems to us that the carload quantity is unquestionably the "usual wholesale quantities" within the meaning of the statute.

Petitioner's views prevailed in the trial court (R. 63), but the intermediate Appellate Court reversed (R. 83), and this reversal was sustained by the court below (R. 97).

SPECIFICATION OF ERRORS URGED.

The court below erred:

1. In holding that the "usual wholesale quantities" relates exclusively to the number of sales, regardless of all other considerations;

2. In refusing to take into account all pertinent facts and circumstances to determine what in fact are the "usual wholesale quantities."

REASONS FOR GRANTING WRIT.

The ruling below is in the teeth of the policy pursued by the Government during the past two decades, with respect to the encouragement of foreign trade through the reciprocal reduction of duties on imports. In the face of the gargantuan efforts of the Government to free international trade by lowering tariff barriers, the decision below applies Section 402 so as to increase the duty in this case arbitrarily by 20%. Almost all imported merchandise is valued for duty purposes under Section 402. Of the five methods of valuation provided, four are dependent upon the "usual wholesale quantities." Arbitrary interpretation of that phrase which increases the applicable duty without warrant involves the very good faith of the Government.

Accordingly, this case presents a question of the interpretation of the customs laws which goes to the very heart of the administration of those laws, is of transcendent importance, and should be resolved by this court.

The Government has recommended to the Congress an amendment to the statute which, if adopted, would supplant the theory upon which the court below based its decision. The amendment defines "usual wholesale quantities" as those "quantities usually sold in the class of transactions in which the *greatest aggregate quantity*" of the merchandise is sold in the foreign market.[1] However, the legislative proposal in question is tied to other recommendations controversial in nature, and along with all legislative proposals, must await its turn for consideration by a Congress overburdened with pressing matters, many of an emergency nature. In the circumstances, and considering the arbitrary nature of the ruling below, and its importance in the administration of the customs laws in connection with our trade policies previously mentioned, certiorari should be granted in order that a prompt determination of the proper standard for measuring duties may be had.

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[1] In an "Analysis of the Customs Simplification Act of 1951" published by the Treasury Department, the following statement is made:

> "The next great object of this amendment is to produce a system of valuation which is fair and equitable and does not produce arbitrary and fictitious results. Entirely apart from questions of administrative expenses and efficiency, the Treasury Department believes that in any system of ad valorem taxation, the value used should be the true value, the market value when the merchandise has a market, and not an arbitrary or fictitious value. This standard the present section 402 does not always meet."

BRIEF.

The Government of the United States can hardly, in good faith, take the lead in urging upon the world a policy of tariff reductions, and itself arbitrarily impose higher duties than are called for by a reasonable application of its own statute.

The unreasonableness of the lower court's interpretation is beyond question. Under that interpretation whereby only the number of transactions can be considered, if there were 51 sales in bushel basket quantities comprising 1% of all the products sold, and 50 sales in carload lots comprising 99% of the volume sold, even if the bushel basket price was double or triple the carload price, the bushel basket price would be taken as the value for duty purposes. Judge Bland of the United States Court of Customs and Patent Appeals foresaw that rigid application of the theory adopted by the lower court would in many instances produce an unconscionable anomaly.[2] If Congress had intended that the number of transactions alone should govern, it could easily have said so.

By the same token, by the use of the word "usual" Congress obviously intended that all facts and circumstances should be taken into account. It established a broad standard for the express purpose of allowing the administrative

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[2] In *U. S.* v. *M. Minkus,* 21 C.C.P.A. (Customs) 382, T.D. 46912 (1934), involving the foreign value of miniature dictionaries, Judge Bland in a concurring opinion stated:

> "I am of the opinion that in most instances the usual wholesale quantity is shown by showing the quantities of the major portions of the sales. Of course, the sales must be made in the usual course of trade, and a freely offered price to all must be shown. As between the major portions of the sales, and the bulk of the business irrespective of the number of the sales, if I were required to arbitrarily choose for the purpose of this case, I would accept the former. It more nearly reflects my view of what in most instances would prove the 'usual wholesale quantity,' *but I am not required, under all circumtsances, to regard proof of a mere preponderance in such sales as fully probative of the issue.*" (Emphasis supplied.)

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body to proceed with the flexibility necessary to meet the variety of situations bound to arise. The establishment of the broad standard in Section 402(c) of the Tariff Act was a recognition by Congress that no set formula would fit all cases coming within the statutory scope, and impliedly prohibited the administrative agency from establishing any such formula.

What constitutes the "usual wholesale quantities" in a business is a variable affected by time, place and circumstances.[3] It is hopeless to attempt to utilize any single mechanical formula, such as a numerical count of types of sales as a ready touchstone to determine the basis for customs duty. This court has recognized that an analysis of all the facts is necessary in each case involving an interpretation of a broad statutory duty. In *Welch* v. *Helvering*, 290 U. S. 111 (1933), Mr. Justice Cardozo considered what constituted "ordinary" business expense. It was there stated:

> "Now, what is 'ordinary' though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstances."
>
> "Here, indeed, as in other branches of law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touch-stone. The standard set up by the statute is not a rule of law; it is rather a way of life."

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[3] See also: *Deputy* v. *DuPont*, 308 U. S. 488 (1940), *Hoage* v. *Hartford Accident & Indemnity Co.*, 64 App. D. C. 258, 77 F. 2d 381 (1935), Cert. Den. 296 U. S. 609 (1935), (where the construction of the Longshoremen's and Harbor Workers' Compensation Act concerned the "usual course of employer's trade" and the Court determined that no mechanical standard could determine what is "usual"), *Morse* v. *New Amsterdam Casualty Co.*, 30 F. 2d 974 (D.C. N.D. Tex. 1929), *Cummings* v. *Hardee*, 70 App. D. C. 18, 102 F. 2d 622 (1939), *In re Handy-Andy Stores of Louisiana*, 51 F. 2d 98 (D.C. W.D. La. 1931) (concerning "usual course of business" under State Bulk Sales Act), *In re Messenger*, 32 F. Supp. 490 (D. C. E. D. Pa. 1940), ("usual course of business" under the Uniform Partnership Act).

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The court below suggests that the question has been settled by previous decisions, but it fails to explain in its opinion why in previous cases the *volume* of sales is repeatedly considered, ostensibly as one of the factors to be taken into account. Thus, in *Adolph Goldmark and Sons Corporation* v. *United States,* 22 C.C.P.A. (Customs) 358, T. D. 47378 (1934), the lower court recognized the relevancy of volume, saying:

> "Not only does this record show that the sale of preserves of the English manufacturer to retail stores for resale were greater in number than the sales to all other classes of purchasers, but it also shows that the greater volume of trade was with said retail stores."

Again, in *United States* v. *G. Gennert, Inc.,* 22 C.C.P.A. (Customs) 374, T. D. 47388 (1934), the lower court held the following questions relating to volume properly admissible in the case involving "usual wholesale quantities":

> "What proportion of pictol, in your opinion, in the United States is consumed by the motion-picture industry?
>
> "Is the quantity of pictol sold to the motion-picture industry greater or less than that sold to the rest of the industries?
>
> "Now, how much of your business, your sales, of pictol during 1929 and 1930, what proportion of it was at 5 pounds, as compared to the quantity sold to the motion-picture industry?"

In *United States* v. *Rodier, Inc.,* 23 C.C.P.A. (Customs) 336, T. D. 48196 (1936), a decision also involving "usual wholesale quantities," the lower court quoted the following language of the Appellate Division in its decision:

> "The record shows that the single piece per pattern is not usually regarded in France as a wholesale quantity; that the ordinary, wholesale quantity is from 100 meters to 300 meters; *that both from the volume of business and the number of transactions, including offers and sales, most of the business in the wholesale*

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> *dress trade in France is done in quantities from 100 to 300 meters. . . .* Affidavit of Rodier shows that it has been the custom in the markets of France for almost a half century to regard a wholesale quantity as more than a single piece of one pattern and color and that a wholesale quantity is ordinarily 100 meters to 300 meters and that *sales* in the French markets *in such quantities* by far outnumber and greatly *exceed in volume the business done in that trade in smaller quantities.*" (Emphasis supplied.)

The earlier cases show conclusively that either consciously or unconsciously, the court regarded the volume of sales at least as a significant factor. Can it be that volume of sales is to be taken into account where the volume factor and the number of transactions test lead to the same result, but that volume is not to be considered where it would outweigh the number of transactions?

There has been no prior case which on its facts holds that the preponderant volume of sales is to be ignored where the larger number of transactions involved sales in smaller quantities at higher prices. Analysis of the cases cited by the court below shows that in those cases the number of transactions in fact reflected the "usual wholesale quantities," or at least there were no other facts presented to indicate that the greatest number of sales doctrine did not reflect the usual wholesale quantities. For example, the case chiefly relied on by the Government is that of *United States* v. *M. Minkus, supra,* which does not hold, as contended by the Government, that factors other than relative number of sales should not be considered. In the absence of any evidence concerning other factors, the court in that case properly indicated the usual wholesale quantity should have been that category in which the greatest number of sales were made. The lower court in the decisions in *Adolph Goldmark and Sons Corp.* v. *United States, supra; United States* v. *G. Gennert, Inc., supra;* and *United States* v. *Rodier, Inc., supra;* cited in its decision (R.), considered the volume of sales in reaching its decisions

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Three of the remaining cases cited by the lower court in support of its decision (R. 103)—*United States* v. *Livingston & Southard, Inc.*, 23 C.C.P.A. (Customs) 214, T. D. 48060 (1935); *United States* v. *Mexican Products Co.*, 28 C.C.P.A. (Customs) 80, C.A.D. 129 (1940); and *American Shipping Co. (Gen. Elec. X-Ray Corp.)* v. *United States*, 29 C.C.P.A. (Customs) 250, C.A.D. 198 (1942)—merely hold that where there is only one quantity price at which the goods are freely offered, that quantity is the usual wholesale quantity. In *United States* v. *American Glanzstoff Corp.*, 24 C.C.P.A. (Customs) 35, T. D. 48308 (1936), it was held that where there was no freely offered price there could be no usual wholesale quantities within the meaning of the statute. In the decision in *Lovell Dressel Co., Inc.*, v. *United States*, 25 C.C.P.A. (Customs) 64, T. D. 49064 (1937), the lower court in remanding the case for dismissal quoted the Appellate Division's observation that, "The usual wholesale quantity cannot be determined . . . by finding the greatest number of sales granted a particular discount, without proof that the most frequently given discount attached to sales in the usual wholesale quantity." Cases such as *Semon Bache & Co.* v. *United States*, 28 C.C.P.A. (Customs) 166, C.A.D. 140 (1940), and *M. V. Jenkins et al.* v. *United States*, 34 C.C.P.A. (Customs) 33, C.A.D. 341 (1946), deal merely with the question of evidence necessary to overcome the presumption which attaches to the correctness of the appraiser's finding, and the sole remaining case cited by the lower court, *United States* v. *Semon Bache & Co.*, 25 C.C.P.A. (Customs) 387, T.D. 49466 (1938), holds merely that all sales at wholesale must be considered in determining what constitutes the usual wholesale quantities.

Only two of the cases cited by the court are at all pertinent, and those two cases suggest at most the possible propriety of a rule of presumption that the number of transactions may be taken as the governing test in the absence of any showing of other factors which rebut the presumption. In the present case, the facts overwhelmingly show that the number of transactions test is arbitrary and

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bears little relation to the standard which Congress intended should be applied.

The legislative history of the successive tariff acts starting with the Tariff Act of 1922[4] conclusively demonstrates that Congress intended that the *ad valorem* rate which it prescribed be applied to "fair value" or "true value" of imported goods, or the "price actually paid by the importer," for such property.

This court has recognized this and has repeatedly held that the Tariff Act intended to use "true" value for appraisement purposes. See *Barr* v. *United States*, 324 U.S. 83, 88, 90 (1945), where it stated:

> "It was noted in *United States* v. *Whitridge*, 197 U.S. 135, 142, 49 L. ed. 696, 698, 25 S. Ct. 406, that the assessment of an *ad valorem* tax on imports involved an ascertainment of the true value of the article taxed as of the date of the tax and that the invoice price was an approximate measurement of that value. As pointed out in that case, the history of the statutes shows a closer approximation to that value as the legislation has evolved. And the enactments made subsequent to the decision in the Whitridge Case are consistent with that trend. . . . If the higher 'official' rate is used in the valuation of the woolens, the cost of the goods will be distorted and an inflated value for customs purposes will be placed upon them. Such a result would be quite out of harmony with the history of these statutes and should be avoided unless the result is plainly required by the language of 522 (c)."

The Tariff Act of 1922, which effected an extensive simplication of the administrative provisions, incorporated in the valuation section the terms "the market value or the price . . . in the usual wholesale quantities." There is no evidence that this definition, when incorporated in the valuation section, was intended by Congress to render dutiable value a less "true" value—one bearing no relationship to "actual" prices. In fact, the evidence proves the contrary.

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[4] 42 Stat. 949 (1922).

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The House version of the 1922 Act initially employed what was known as the American valuation plan. This contemplated using as dutiable value the price of comparable domestic products. The Senate Committee disapproved this scheme and in its report explained why it insisted on the retention of the foreign valuation plan which is currently the primary basis of valuation. In explaining foreign valuation, the Committee observed:[5]

> "Under the foreign valuation plan the price *paid for imported merchandise* is the fundamental basis for appraisement. It is the basis for the invoice and the entry. Without this foundation, appraisements would become chaotic, as the price paid for an article safeguarded by oath and declaration and various other stringent provisions for false statements and perjuring is the starting point of an appraisement, supplemented always by any and all ways and means in his power to determine the market value at date of shipment. When an article is imported, the *price the importer paid is the primary consideration* at the time of entry of the merchandise at the custom house. Under the American valuation plan, however, the price he paid for his merchandise becomes secondary." (Emphasis supplied.)

Since the Tariff Act of 1930 made no material alteration in the definition of foreign value which appeared in the 1922 Act, Congress intended that the "true" or "actual" value of imported merchandise should be the basis for customs duties. Yet here 95% of the sales experience has been ignored in determining such value. It is patent that such a method of valuation is bound to result in a fictitious value.

Respectfully submitted,

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May 16, 1952

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[5] Sen. Rep. 595, 67th Cong., 2nd Sess., April 10, 1922, p. 7.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 778

F. S. WHELAN & SONS, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the trial judge in the Customs Court (R. 63-75) is reported in 25 Cust. Ct. 384. The opinion of the Appellate Division of the Customs Court (R. 83-95) is reported in Treasury Decisions, Vol. 86 (Weekly Pamphlet No. 21, p. 40). The opinion of the Court of Customs and Patent Appeals (R. 97-104) is reported as C.A.D. 482 in Treasury Decisions, Vol. 87 (Weekly Pamphlet No. 14, p. 54).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on February 18, 1952 (R. 104). The petition for a writ of certiorari was filed on May 16, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1256.

QUESTION PRESENTED

In so far as here pertinent, Section 402 (c) of the Tariff Act of 1930 (19 U.S.C. § 1402) provides that for *ad valorem* duty purposes the foreign value of imported merchandise shall be the market value or price at which such or similar merchandise is sold "in the usual wholesale quantities." The question is whether the courts below have properly construed this phrase as meaning the quantities in which the largest number of sales are made rather than the quantities in which most of the total volume of the product is sold but in a smaller number of sales.

STATUTE INVOLVED

Section 402(c) of the Tariff Act of 1930, as amended (46 Stat. 590, 708; 52 Stat. 1081; 19 U.S.C. 1402(c)) provides as follows:

> (c) FOREIGN VALUE.—The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual

wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

STATEMENT

On August 25, 1947, petitioner imported into the United States at the port of Detroit from Canada certain birch plywood. The plywood was entered for duty purposes at a value represented by the prices at which the manufacturer sold it in carload lots in the principal market of Canada. The Customs officials appraised the merchandise for *ad valorem* duty purposes at a higher price on the basis of the foreign value represented by the prices at which such or similar plywood was sold at wholesale for home consumption in the principal market of Canada in quantities of less than 5000 square feet. (R. 63.)

The importer thereupon filed an appeal for a reappraisement by the Customs Court pursuant to Section 501 of the Tariff Act of 1930, as amended, 46 Stat. 590, 730-731, 52 Stat. 1084; 19 U.S.C. 1501 (R. 6). At the trial of the case before a single judge, counsel for the parties stipulated that the foreign value, as defined in Section 402(c) of the Tariff Act, *supra,* was the proper basis for appraising the merchandise; that there was no export value higher than the foreign value; that Montreal was the principal market in Canada for

such merchandise; and that if quantities less than 5000 square feet constituted the usual wholesale quantities in which the plywood was sold in Canada, the appraised value represented the foreign value, but if carload lots constituted the usual wholesale quantities in which it was sold in Canada, then the carload-lot price represented the correct foreign value of the merchandise. (R. 13-14.) It was also agreed by counsel for the parties that the sales experience of the exporter in Canada during the period from October to December 1947, though subsequent to the date of exportation, accurately typified its practice as to sales at the time the particular merchandise was exported from that country (R. 10, 85). The evidence showed that the manufacturer made 268 sales during that period. 59 sales were in carload lots, 39 sales were in quantities of less than a carload but over 5000 square feet, and 170 sales were in less than carload quantities and under 5000 square feet. The carload sales represented approximately 90 per cent. of the total quantity sold. The sales of less than carload lots but over 5000 square feet constituted about five per cent. of the total quantity sold, and the sales in quantities of under 5000 square feet also constituted about five per cent. of the total quantity sold (R. 38-39).

The single judge reappraised the merchandise on the basis of its foreign value and held that the usual wholesale quantity in the principal market of Canada for such merchandise was a carload lot.

Consequently, he found that the foreign value was represented by the carload-lot price. (R. 63-75.)

Upon an application by the Government for review of the decision of the single judge (R. 77-81), the Appellate Division of the Customs Court in considering the matter *de novo* disagreed with the single judge, and, in reappraising the merchandise, held that the quantities involved in the sales of less than 5000 square feet represented the usual wholesale quantities for foreign value purposes under Section 402(c) of the Tariff Act (R. 83-95). Upon an appeal by the importer to the Court of Customs and Patent Appeals, that court affirmed the decision of the Appellate Division of the Customs Court (R. 97-104).

ARGUMENT

1. There is no merit or relevancy in petitioner's contention that the decision of the Court of Customs and Patent Appeals interpreting the term "usual wholesale quantities" appearing in Section 402(c) of the Tariff Act of 1930, *supra,* pp. 2-3, flies in the teeth of the Government's present tariff policy. The phrase "usual wholesale quantities" has long appeared in succeeding tariff acts. In its present context, it appeared in Section 402(b) of the Tariff Act of 1922, 42 Stat. 858, 949, and was reenacted without change by Congress in the Tariff Act of 1930. It has not been changed since. Obviously, the proper interpretation of that term depends upon the intention of Congress in 1930 when it last enacted the provision.

2. The interpretation placed by the court below on "usual wholesale quantities", now appearing in Section 402(c) of the Tariff Act of 1930, *supra,* pp. 2-3, is one of long standing. During the life of the Tariff Act of 1922, the Court of Customs Appeals (now the Court of Customs and Patent Appeals) ruled that the term "usual wholesale quantities" appearing in Section 402 of that Act referred to "a major portion of the sales or offers for sale of the merchandise in question." *G. W. Pleissner* v. *United States,* 16 Ct. Cust. Appls. 507 (1929). Later the court below in the case of *United States* v. *M. Minkus,* 21 C. C. P. A. (Customs) 382 (1934), in again interpreting Section 402 of the 1922 Act, reiterated its holding in the *Pleissner* case that the term "usual wholesale quantities" was intended by Congress to refer to the quantities involved in the major portion of the sales of the pertinent merchandise in the applicable period. The same test has been repeatedly applied after reenactment of the provision in the Tariff Act of 1930, *supra,* pp. 2-3. *Adolph Goldmark & Sons Corp.* v. *United States,* 22 C. C. P. A. (Customs) 358, 361 (1934); *United States* v. *G. Gennert, Inc.,* 22 C. C. P. A. (Customs) 374, 379 (1934); *United States* v. *Livingston & Southard, Inc.,* 23 C. C. P. A. (Customs) 214, 217-219 (1935); *Lovell Dressel Co.* v. *United States,* 25 C. C. P. A. (Customs) 64 (1937); *Jenkins Brothers* v. *United States,* 25 C. C. P. A. (Customs) 90 (1937); *United States* v. *Semon Bache & Co.,* 25 C. C. P. A. (Customs) 387 (1938); *United States* v. *Mexican Products Co.,* 28 C. C. P. A.

(Customs) 80, 89 (1940); *M. V. Jenkins* v. *United States,* 34 C. C. P. A. (Customs) 33, 39 (1946). The *Minkus, Jenkins Brothers,* and *Livingston & Southard* cases are directly in point here, since in each the greater volume of the total product was not sold in the quantity sold in the greatest number of sales. See discussion of the *Minkus* and *Jenkins Brothers* cases in the opinions below (R. 102, 90-91). In the *Jenkins Brothers* case, the court below held the "usual wholesale quantities" of certain gauge glasses to be the quantities reflected in the greatest number of sales, although as to one quality of the gauge glasses, the greatest number of sales, as shown by the manufacturer's affidavit, involved only about 25 per cent of the total value of merchandise sold by the manufacturer in the applicable period. See pp. 92-94.

It will be observed that the interpretation placed upon the pertinent statutory language by the court below is one resulting from long experience by that court in dealing with the complex problem of laying down proper and workable rules for appraising merchandise for *ad valorem* duty purposes under the various methods provided for by Congress in Section 402 of the Tariff Act of 1922 and again in Section 402 of the Tariff Act of 1930. Moreover, Congress seems to have adopted that interpretation, since it passed the Tariff Act of 1930 after the interpretation was announced in the case of *G. W. Pleissner* v. *United States,* 16 Ct. Cust. Appls. 507.

3. In any event, petitioner has not shown that

the long-standing interpretation placed by the court below on the statutory language is wrong.

Petitioner seems to urge (Pet. 6) an interpretation which would require the appraising officers to "take into consideration" in determining "usual wholesale quantities" under Section 402 of the Tariff Act both the volume of merchandise in each sale and the number of sales—and also, presumably, all other relevant factors, depending upon the circumstances in each particular case. A volume test alone, of course, would produce no more equitable results over the long run than that adopted by the court below, and petitioner does not urge that volume be the controlling factor. To use only the sales in which the greater volume was sold would not provide a satisfactory criterion in a case where most of a product is sold in a single sale or a very few sales comprising a very small proportion of the total number of sales. See *Minkus* case, quoted at R. 90. But the "take-everything-into-consideration" interpretation urged by petitioner does not appear to be workable either from an administrative viewpoint or from that of the importer. For not until all factors had been subjectively weighed, after importation, by the ultimate authority, would either the importer or the operating officials of the Customs Bureau know with any certainty what the duty should be. The "number of sales" test provides a method of calculation which can be applied with some degree of mathematical precision, once the facts are known, and would seem to be in closer accord than any other test with the statutory lan-

guage—"usual wholesale quantities." The possibility that in some cases this formula, like any other, may not appear to operate equitably, does not justify substitution of a subjective rule which might seem more reasonable as applied to a particular set of facts but which would not be workable in general operation.

The interpretation urged by petitioner thus is not as reasonable as that adopted by the court below, since its results would be no more equitable and since its complexities render it less favorable from an administrative viewpoint. In the circumstances, there is no sound reason to disturb the interpretation of the phrase in question to which the court which is thoroughly familiar with the problems of customs law has long adhered.

CONCLUSION

For the above reasons it is respectfully submitted, that the petition for a writ of certiorari should be denied.

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